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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 388

THE CITY OF CORAL GABLES,
Petitioner,

Versus

ED C. WRIGHT, ET AL,
Respondents.

BRIEF ON BEHALF OF RESPONDENT, THE AMERICAN NATIONAL BANK OF NASHVILLE, ON PETITION OF CITY OF CORAL GABLES, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

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PRELIMINARY STATEMENT

On pages 5 to 15, of the petition for writ of certiorari in this case, the petitioner assigns the reasons why it is contended a writ of certiorari should issue.

The petitioner asserts that the purpose, interpretation and application of Section 83(e)(5) and Section 83(j) of the Municipal Bankruptcy Act, have not hereto-

fore been passed upon by this Court, excepting indirectly, by the denial of petition for certiorari in other cases, and that the question is of importance to petitioner and numerous other municipalities, and in conflict with decisions of other Circuit Courts of Appeal.

The petition and supporting brief fail to point out facts or decisions which sustain these contentions.

Section 83(e)(5) of the Municipal Bankruptcy Act, U. S. C. A., Title 11, Sec. 403(e)(5) is in the following language:

> "The offer of the plan and its acceptance are in good faith."

On this point, the Circuit Court of Appeals held:

> "What is significant is that the city in 1937 completed and thereafter entirely abandoned the voluntary plan it had supported in 1936 and secured the acceptance of in 1937, and that the present proceeding is an entirely new proceeding and in no sense a completion of that plan. Of the greatest significance, too, in determining that the plan was not filed in the legal good faith the law requires is the fact that in requesting consents of holders of its refunded securities the city made it plain that the consents were not requested as a part of the plan devised to protect the city from its then financial involvements, in the abnegations and sacrifices of which all would share. They were requested and were to be used to bludgeon into submission those with whom the city have not been able to

make settlements satisfactory to itself. The statutory provision for municipal composition of indebtedness was not intended to operate in this way."

". . . *The plan was not submitted in good faith, it is not fair to the opposing creditors, the consents of* those who had taken the refunding bonds were not, under the circumstances the record discloses, properly voted in its favor."

A conflict is alleged with the decision in *Ouerbacker vs. Henderson County*, 126 Fed., (2d) 309. That decision was in part:

"The county proposed a second plan supplemental to the first, and this supplemental plan was submitted to bondholders and accepted by 75% in amount."

Coral Gables put its plan into effect in 1937, and thereafter abandoned it and never attempted to enforce it. No attempt was ever made to file a supplemental or amended plan. The manifest purpose of this proceeding is to breathe life into a moribund plan and invoke the aid of the Court to commit a grave injustice against creditors whose obligations were not refunded. No conflict with decisions of other Circuit Courts of Appeal is shown. In effect, the petition seeks a rehearing of an adverse decision of the Court of Appeals.

A conflict is alleged with the decision in *Wells Fargo Bank & Union T. Co. vs. Imperial Irr. Dist.*, 136 Fed.

(2d) 539, but that court expressly holds that the plan before the Court "is nothing more than a modification of the plan of 1932."

It is nowhere denied that a plan may be changed or modified. The act outlines procedure to be followed, which was not done by petitioner, nor is there any allegation that this was attempted. No case holds that a plan completed and discarded years ago can be revived under the circumstances here presented. The language of the Court of Appeals abundantly supported by the facts in the record completely disposes of this contention. All testimony is in agreement on this point.

The second complaint is that Section 83(j) U. S. C. A., Title 11, 403(j) providing that consents of holders of refunded securities may be used where a plan is partially completed was held not to operate, and various cases are cited in this connection.

Again, the language of the Court of Appeals is a complete reply, we quote:

> "Remedial and beneficial as subsection (j) was intended to be and is, when properly applied, it was not intended to, it could not constitutionally be applied in the way attempted here, for the result of such application would be to deprive the assents of the constitutional base on which their efficacy as consents rests."

Continuing, and speaking of *American National Bank vs. City of Sanford*, 112 Fed. (2d) 435,

> "Nothing in the Sanford case departs from or is in conflict with this view. We there recognized that if the plan had been completed the city could not have used it merely to put pressure upon those who by the consents of others had become better situated to compel them to surrender the benefits which the prior consenting had conferred. All that was held there was that in respect of a partially executed plan which was still in process of completion, it was competent for Congress to provide that those who had already given their consent could vote now for then for the completion of the plan. We did not, we could not hold, that where as here a plan has been entirely completed and it is sought to revise it under changed conditions for the sole purpose of forcibly scaling the debts of non-consenting creditors, the consents of persons holding refunded securities issued under that plan could be solicited and counted as effective consents under subsection (j). The plan was not submitted in good faith, it is not fair to the opposing creditors, the consents of those who had taken the refunding bonds were not, under the circumstances the record discloses, properly voted in its favor."

Other cases cited in this portion of the petition do not sustain the contention of petitioner that a conflict exists.

The decision of the Court of Appeals and cases cited conclusively negative any conflict in the decisions of the various courts. Petitioner here disagrees with the find-

ings of fact of the Circuit Court of Appeals and insists that the findings of the District Judge are correct and controlling here, and prays that this Court review the entire record and again determine the fact. The facts as found by the Court of Appeals are fully supported by the record and differ little from the findings of fact below, the difference being one of construction.

Petitioner sets out under the caption, *QUESTIONS PRESENTED*,ten grounds for reversing the decision of the Court of Appeals:

The first four of these questions are, in reality two, which have been heretofore replied to. The two questions or errors are:

(1)

That the City did not act in good faith, and

(2)

That the plan was not a partially completed plan.

The District Court held that, so long as present objecting creditors received the amount of securities permitted or alloted under the original plan, that, (1) the completition of the plan, (2) the abandonment of the plan, and (3) special settlements with the other creditors, did not prejudice the rights of the present objecting creditors and did not permit them to object to this proceeding. The District Court held that the City owed

no duty to the present objecting creditors to pay them the same amount as paid to other creditors in the same class, and accord them the same treatment, and ordered the acceptance of this completed and abandoned plan by this respondent and its co-respondent Ed C. Wright. Other creditors who had refused to accept the plan and had received payment in full or partial payments in excess of the amounts now proposed to be paid are to be permitted to retain all payments heretofore received, and to accept the plan only as to the uncollected balance. The Court of Appeals repudiated any such holding, and the only conflict now presented is the conflict between the decision of the District Court and the Court of Appeals.

The fifth question does not raise a question of law but of facts only, the allegation being that the record does not support the findings of fact of the Court of Appeals. No facts are in dispute, the findings of the Court of Appeal are amply sustained, and Petitioner is seeking to have reviewed the entire record in the hope, and futile hope, that the findings of facts by the Court of Appeals as may be set aside, as a result of a review by this Court of the entire record in this cause, and the cause reversed as a result of new or different finding of facts by this Court.

Questions six, seven, eight and nine relate to the application of the Municipal Bankruptcy Act and to alleged conflict of this decision with decisions of other Courts of Appeal. The tenth question is a mere statement that the Court erred.

This respondent, The American National Bank of Nashville, here replies to Petition and Brief.

SUMMARY OF BRIEF

There is in fact a single question involved in the Petition, which is:

> MAY THE PETITIONER REARGUE AND AGAIN PRESENT THE FACTS TO THIS COURT, TO BE ASCERTAINED ONLY BY AN EXAMINATION OF THE ENTIRE RECORD, TO THE END, THAT THE DECISION OF THE COURT OF APPEALS MAY BE REVERSED, HOLDING (1) THAT THE PETITION AND PLAN WERE NOT FILED IN GOOD FAITH, AND (2) THAT SUBSECTION 83(j) WAS NOT APPLICABLE?

RELIEF SOUGHT

The relief sought is that the judgment and Opinion of the 5th Circuit Court of Appeals in the case of *Wright v. City of Coral Gables, Florida*, now reported in *137 Fed. (2d) 192*, be reversed and the District Court affirmed.

JURISDICTION OF THE COURT

This respondent concedes that the jurisdiction of this Court is correctly stated in the Act cited by Petitioner.

CONCISE STATEMENT OF THE CASE

The City of Coral Gables is a municipal corporation of Florida, incorporated in 1925, and reincorporated in 1929.

The City defaulted on bonds in 1930, and aside from some interest paid to depositing bondholders, paid nothing until 1937.

By an Ordinance passed in December 1936, a voluntary refunding of indebtedness was authorized, contingent upon acceptance by 90% of the creditors. The Plan was to issue new bonds for one-half the principal indebtedness and to issue an unusual form of security, of little value and designated Tax Participation Certificates, for the remainder of principal and all interest. The City contracted to do various other things, such as specific tax levies, setting up a sinking fund, buying bonds, etc. For technical reasons, the Ordinance was amended at a later date, but this amendment is unimportant.

A Plan was issued pursuant to the Ordinance and acceptances requested. The City then employed a financial Agent to induce acceptances, turning over to him a large amount of city funds, approximately $500,000.00 to buy bonds of those refusing to accept the Plan. More than 90% of the bondholders (including those who sold their securities, or who made special settlements) were induced to accept the refunding Plan, and in the fall of 1937 the Plan was declared in effect and the new securities distributed.

Thereafter, the Plan was never observed and differing compromises were made with creditors. The City Manager states each of these cases (compromises with creditors after 1937) was considered separately in the light of the possibilities and the necessities. (*Rec. 796 to 798.*)

Some creditors, whose claims had not been adjusted, brought suit and obtained judgment. Some were paid in full and others received much more than provided in the Plan.

In June 1940, the City, having failed to agree with this respondent and its co-respondent, Ed C. Wright, filed this Petition in Bankruptcy. The usual questions were presented as to the sufficiency and fairness of the Plan, compliance with the Act and consents of creditors. The facts are not disputed. The interpretation of facts is disputed. The District Court was reversed by the Court of Appeals, principally on three grounds, not actually controverted, viz:

1. That the 1936 Plan, after being declared in effect in 1937, was completely performed and then abandoned. There was no partially completed Plan in existence at the time of the filing of the Petition in June 1940.

2. That the Plan was *not fair* and *equitable;* was *not filed in good faith,* but filed for the purpose of "*bludgeoning*" two creditors.

3. That the required consents of creditors were not valid or admissible under the Act.

More concisely stated, the City of Coral Gables adopted a Plan in 1936, conditioned upon the acceptance of 90% of its creditors. On the date of adoption, the Municipal Bankruptcy Act was not in effect. At the time of the first exchanges in September or October, 1937, the present Act was in effect, being passed August 16, 1937. See *U. S. C. A. Title 11, Sec. 401.* No recourse was then had to the Act nor was there ever an attempt to conform the Plan to its provisions, nor did the City attempt even to obey the plain provisions of the Act.

The Voluntary Plan of 1936 was declared in effect in 1937 and was fully completed and ended. This proceeding initiated in 1940 was the first attempt thereafter to enforce a plan of composition. The Plan, as it appears from the record, is admittedly not the Plan submitted pursuant to the 1936 Ordinance and is not the Plan attached to the petition. It is admitted that the 1936 Plan is now incapable of performance because of what petitioner calls "changed conditions." These alleged "changed conditions" are relied on by petitioner to compel the enforcement of a new Plan never submitted to creditors. The 1936 Plan has never been changed or modified as provided in the Act, nor has any attempt been made to change or modify it as there provided.

The record permits no dispute as to facts. The Fifth Circuit Court of Appeals reversed the District Court and held adversely to petitioner. It is alleged that the Court of Appeals is bound both by the findings of fact and conclusions of law of the District Court and should for

these reasons be reversed. In this concise statement we have omitted references to tax levies, mandatory levies and other details of the Plan, which would further demonstrate the unfairness and lack of good faith of the Plan and Petition. These questions of fact cannot now be reviewed in this application.

ARGUMENT.

Petitioner divides its Argument into four questions, numbering the first one presented II, and in reply we will use the same numbering.

—II—

FIRST QUESTION

It is contended that the Court of Appeals misinterpreted the purpose and effect of Section 83(j) of the Municipal Bankruptcy Act.

This Section is perfectly plain. The subheading is "Effect of Partial Completion or Execution of Plan." The text is substantially the same and only permits holders of securities outstanding as the result of the *partial completion or execution* of a plan to consent to a Plan.

The cases cited by Petitioner, which it alleges conflict with the present decision, do not support this contention and have been commented on. The difficulty of Petitioner is that no partially completed plan or incomplete plan exists.

—III—

SECOND QUESTION

This Second Question challenges that part of the decision of the Court of Appeals holding that the Plan was not offered in good faith.

One element of good faith is the necessity of solicitation of actual consents to the Refunding Plan. Note 2 to the Opinion of the Fifth Circuit Court of Appeals sets out the letter sent to holders of securities received under the former voluntary Plan. This letter and solicited reply show that the consent "is merely a ratification of your acceptance of the Refunding Plan." The quoted language shows no consent was sought or granted, but merely a ratification of the 1937 voluntary plan of refinancing. It is not even shown that at the time of the consent the party executing it had any interest in the transaction or was then a holder of bonds, and no check was permitted which would ascertain this fact.

An attack is made upon this respondent charging it with the acceptance of coupons resulting in the creation of an artificial defense. This question is not before this Court and will not be argued. Suffice it to say, that the coupons held by this respondent are recognized as a valid and existing part of the debt, and the right of this respondent to acquire and hold them is conceded, and it is therefore entitled to the benefits of the decision rendered.

In this connection, the entire argument is asking this Court to review a finding of facts and not a question of law, which we submit will not be done.

—IV—

THIRD QUESTION

This argument is divided into three parts (a) that there was no lack of identity of interest of those consenting in the instant case with those sought to be compelled by the Plan, (b) that changed conditions did not alter identity of interest, and (c) that the opinion should be clarified.

At the outset, it appears that in 1937 no attempt was made to coerce any creditors and consents were voluntary. From the pleadings alone, and especially from the record, it is manifest that inducements entirely outside of the Plan were offered creditors to induce the filing of consents, and by these artificial means, never contemplated by the Plan, sufficient consents were obtained to enable the City to issue the requisite amount of refunding securities to put the Plan in effect. Some effort was made, without regard to the Plan, to refund other securities, and some were refunded. Other creditors were paid and were paid varying amounts, and with this situation outstanding a Petition is suddenly filed stating that all creditors are on an equal footing, and that a Plan, never really in effect and which could not now be put in effect, was a partially completed plan with a complete identity of interest. The decree of the

District Court admits that even the parties to the suit cannot be compelled to accept the original Plan, but that some must be allowed to retain payments legally received and simply refund the balance. The argument of petitioner must fall to the ground on this section, and a reading of the decree of the Court of Appeals shows it needs no clarification.

—V—

FOURTH QUESTION

This section complains that the Court of Appeals disagreed with the District Judge, alleging that the findings of fact support the latter, and also the dissenting opinion of Justice Waller. Quotations from the decisions of the District Court are cited.

This case was fully briefed and argued before the Circuit Court of Appeals. The record was referred to by counsel for all parties and the conclusion of the majority of the Circuit Court of Appeals as to both the facts and the law is amply supported.

In conclusion, there is no question here presented of importance to another than petitioner, but this Court is asked to reverse the Court of Appeals on the sole and real ground that the facts do not support the decision of that Court.

This Court recently held "Review of the facts is not the conventional function of this Court, and resort to it

at this state of this litigation is somewhat less than fair to the courts below as well as to the litigants."

> *Indianapolis v. Chase National Bank, 312 U. S. 63, 86 L. Ed. 48, at p. 57.*

Petitioner insists that, if the 1936 Plan was fair when promulgated, and if the objecting creditors will receive the same distribution in 1943 as they would have received on accepting the Plan in 1937, intervening happenings, consisting of admitted preferences to many creditors and the completion and abandonment of the Plan, may not now be considered by a Court. The insistence is that objecting creditors can now be coerced into accepting the same distribution as they would have received on a voluntary acceptance in 1936, notwithstanding changed conditions and the admitted impossibility of now carrying out the terms of the Plan set out in the Petition, and preferential treatment of other creditors, now sought to be treated as "consenting creditors."

In support of the statements heretofore made that the 1936 ordinance resulting in the accepted Plan of 1937 is admittedly not the Plan now attempted to be enforced, we quote the following from the interlocutory decree of the District Court:

1. "That the holders of all claims based on the obligations of The City of Coral Gables, set out in the Plan of Composition, and which have been admitted by the Petitioner or allowed by the Judge, are hereby classified as creditors of the same class; and the Court finds that

there is but one class of creditors, namely, those having claims payable without preference from the proceeds of ad valorem debt service taxes levied pursuant to the Charter authority of the said City and that there are no claimants having either specific property or revenues pledged for the payment of said claims."

2. "That the claimants, Fiduciary Counsel, Inc., C. J. Root, Augustus T. Ashton, Lois Harmon, W. J. Noel and G. E. Vallette, each have a vested right in and to all of the moneys paid to each of them by the Petitioner prior to the filing of the petition in this cause out of the proceeds of special earmarked tax levies made by the Petitioner for the benefit of the said claimants."

3. "That the balance, as of July 1, 1940, of the indebtedness of all creditors holding judgments and peremptory writs of mandamus against the Petitioner shall be refunded as of January 1, 1937 in the manner and according to the provisions of the Plan of Composition set out in Ordinance No. 269, amended by Ordinance No. 289, except that all coupons on Refunding Bonds falling due on and prior to July 1, 1940 shall be detached and such coupons canceled before exchange with such creditors."

See Record, pp. 1829, 1830, 1831

4. Without quoting, and in the Record on page 1832 there is a special computation to be made in settlement of claimant C. J. Root, and a special computation to be

made in the settlement of claimant Fiduciary Counsel, Inc.

Thus the decree orders the two objecting creditors mentioned, to wit, Ed C. Wright and the American National Bank, to be settled with on the 1937 basis. It orders the six creditors hereinabove named to be settled with on an entirely different basis. It permits creditors who have been paid in full or otherwise settled with in full between 1937 and 1940, to retain without adjustment all amounts received, and then orders special settlements with two of the judgment creditors, Root and Fiduciary Counsel, Inc.

At least three plans are before the Court for confirmation and they are claimed to be a single plan. At least two of the plans have never been submitted to or approved by creditors. Petitioner alleges that "changed conditions" justify the approval of the plan or plans. No reason is assigned and no argument is made why "changed conditions" should thus affect this proceeding and the Municipal Bankruptcy Act. Petitioner also seems to insist that the Plan filed with the original Petition in the District Court is a single Plan, is the original Plan, and is filed in good faith. Again, Petitioner does not assert anywhere that the obligations of the City of Coral Gables under the 1936 Plan have been performed, again relying on "changed conditions" for failure to perform. An outstanding example of such failure is the failure of the City to levy taxes as agreed, in that the agreed debt service levy was reduced by the mandatory

levies for judgment creditors, which creditors received the entire proceeds of the mandatory levies.

We respectfully pray that the Petition be denied.

Respectfully submitted,

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